

WEBINAR WEDNESDAYS



Wednesday, July 7, 2021

Out-of-State Convictions and "Strict Conformity"

Presented by:

Joshua Smith

Assistant Attorney General
Arizona Attorney General's Office

Distributed by:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
3838 N. Central Ave., Suite 850
Phoenix, Arizona 85012

ELIZABETH BURTON ORTIZ
EXECUTIVE DIRECTOR

OUT-OF-STATE CONVICTIONS AND “STRICT CONFORMITY”

Joshua Smith
Assistant
Attorney
General
Criminal
Appeals
Section

USING PRIOR CONVICTIONS

- A number of statutes allow you to use a defendant's prior convictions to enhance/aggravate their sentence
 - See, e.g., ARS §§ 13-701(D)(11) (statutory aggravating factor for prior felony conviction), 13-703 (repetitive offender sentencing) 13-705 (allowing for enhanced sentences if a defendant was previously convicted of a "predicate felony"); 13-708 (allowing for enhanced sentences if defendant was on probation for a felony offense)
- Other statutes require proof of a prior conviction as an element of the offense
 - See, e.g., ARS §§ 13-3102(A)(4) (misconduct involving weapons for a prohibited possessor); 13-3601.02(A) (aggravated domestic violence); 28-1382(A)(2) (aggravated DUI based on prior convictions)
- The question is what do you do if a defendant's prior conviction is from a jurisdiction other than Arizona

USING PRIOR CONVICTIONS - OUTLINE

- The Arizona Supreme Court has set forth the test to apply in order to determine whether an out-of-state conviction can be used to enhance a defendant's sentence – the “strict conformity” or comparative elements test
- Roadmap of the presentation
 - Strict conformity standard
 - Statutes expressly incorporating the strict conformity standard
 - Statutes expressly exempted from the strict conformity standard
 - Statutes that require proof of a prior conviction as an element
 - Statutes without express language either way
 - Practice pointers

THE “STRICT CONFORMITY” STANDARD

STRICT CONFORMITY

- Before an out-of-state conviction can be used for sentencing enhancement purposes, the sentencing court “must first conclude that the foreign conviction includes every element that would be required to prove an enumerated Arizona offense.” *State v. Crawford*, 214 Ariz. 129, 131, ¶ 7 (2007)
 - See also ARS § 13-105(27) (defining “offense” as “conduct for which a sentence to a term of imprisonment or of a fine is provided by any law of the state in which it occurred or by any law, regulation or ordinance of a political subdivision of that state and, if the act occurred in a state other than this state, it would be so punishable under the laws, regulations or ordinances of this state or of a political subdivision of this state if the act had occurred in this state.”)

STRICT CONFORMITY

- “[B]efore enhancing a defendant’s sentence,” based on an out-of-state conviction, “the trial court must determine that the underlying foreign offense ... has an analog under Arizona law. The court makes this determination by comparing the elements of the foreign offense with those in the relevant Arizona statute,” and there “must be strict conformity between the elements of the foreign offense and an Arizona felony.” *State v. Large*, 234 Ariz. 274, 282, ¶ 27 (App. 2014)
- The analysis focuses “solely on the elements of the foreign statute under which the defendant was convicted[.]” *Crawford*, 214 Ariz. at 131, ¶¶ 6-9.
 - “[O]nly the statutory definition of the prior crime, and not its specific factual basis can be considered in determining whether a foreign conviction” strictly conforms with an Arizona statute. *Id.* at 131, ¶ 8.

STRICT CONFORMITY

- Strict conformity exists if the fact finder in the out-of-state case would be required to “actually [find] beyond a reasonable doubt that the defendant had committed every element that would be required to prove [an] Arizona offense.” *State v. Clough*, 171 Ariz. 217, 219-20 (App. 1992)
 - See also *State v. Ault*, 157 Ariz. 516, 521 (1998) (“In order to say that the California convictions would constitute one of the felonies enumerated in [the relevant statute], we must be sure that the juries in the prior cases actually found beyond a reasonable doubt every element that would be required to prove an enumerated Arizona offense.”) (internal quotation marks omitted).
- “If under any scenario it would have been legally possible for the defendant to have been convicted of the foreign offense but not [an] Arizona offense, then the foreign offense fails the comparative elements test” and there is not strict conformity. *State v. Dunbar*, 249 Ariz. 37, 50, ¶ 37 (App. 2020)

EXAMPLE: STRICT CONFORMITY

Tenn. Code Ann. §§ 39-13-401, 403(a)
Especially Aggravated Robbery

- Intentional or knowing theft of property
- From the person of another
- By violence or putting the person in fear
- Accomplished with a deadly weapon and where the victim suffers serious bodily injury

ARS §§ 13-1902(A), -1904(A)
Armed Robbery

- Taking any property of another
- From his person or immediate presence and against his will
- Through threats or force intended to coerce surrender of property or prevent resistance
- Accomplished while armed with a deadly weapon or simulated deadly weapon

EXAMPLE: NO STRICT CONFORMITY

Texas Penal Code § 21.11(a)(1) Indecency with a Minor

- Defendant engages in sexual contact with a child, or
- Causes a child to engage in sexual contact
- The child is younger than 17 years of age

ARS § 13-1410(A) Molestation of a Child

- Intentionally or knowingly engaging in sexual contact with a child, or
- Causing a person to engage in sexual contact with a child
- The child is under 15 years of age

STRICT CONFORMITY – NARROWING THE SCOPE

- Although courts may not consider the facts supporting a prior conviction, they can consider other information—such as charging documents, sentencing paperwork and plea agreements—to determine which subsection of a foreign statute the defendant was convicted under.
 - *Crawford*, 214 Ariz. at 132, ¶ 11 (stating courts may use “a charging document only to narrow the conviction to a particular subsection of the statute that served as the basis of the foreign conviction”) (internal quotation marks omitted)
 - *State v. Moran*, 232 Ariz. 528, 534, ¶ 16 (App. 2013) (“A charging document or judgment of conviction may be used only to narrow the statutory basis of the foreign conviction, not establish the conduct underlying it.”)
 - *State v. Thompson*, 186 Ariz. 529, 532-33 (App. 1996) (affirming defendant’s enhanced sentence based on information contained in sentencing documents which “narrowed the frame of reference” of the statute underlying the out-of-state conviction)
 - *Cf. State v. Joyner*, 215 Ariz. 134, 141-43, ¶¶ 21-25 (App. 2007) (discussing whether courts may consider “evidence of the conviction,” such as jury instructions and plea agreements, to determine the facts necessarily found in reaching a verdict to narrow the statute underlying a conviction under certain circumstances)

WHAT IF A DEFENDANT ADMITS HIS PRIOR FELONIES?

- Even if a defendant admits his prior felony convictions, you still have to prove any out-of-state conviction would satisfy the comparative elements test
 - “[A] defendant’s admission that he has a prior felony conviction does not relieve the state of its burden to prove that the foreign conviction established ‘every element that would be required to prove that such offense would be a felony in Arizona.’” *State v. Smith*, 219 Ariz. 132, 133, ¶ 10 (2008) (quoting *State v. Heath*, 198 Ariz. 83, 84, ¶ 4 (2000)).
 - A defendant’s admission of prior felonies “does not constitute proof that the foreign conviction constitutes a felony in Arizona, because that question raises an issue of law” which the trial court must decide. *Heath*, 198 Ariz. at 84, ¶ 4

STRICT CONFORMITY TO ESTABLISH THE NATURE OF A PRIOR CONVICTION

- Some statutes allow for enhanced sentencing if the defendant's prior convictions are a certain category of offense. See, e.g., ARS §§ 13-901.01(B) (excluding defendants who have been previously convicted of “a violent crime” from mandatory probation); 13-705(Q)(2) (defining “predicate felony” for DCAC sentencing to include a prior “sexual offense”)
- Other statutes require that you prove the defendant committed a certain type of offense as an element of the offense. See, e.g., A.R.S. § 13-3601.02(A) (requiring that defendant have been previously convicted of a “domestic violence offense”).

STRICT CONFORMITY TO ESTABLISH THE NATURE OF A PRIOR CONVICTION

- Strict conformity type analysis is employed in determining whether a prior conviction falls within a specified category of offense
 - *State v. McCray*, 218 Ariz. 252, 257, ¶ 17 (2008) (“In determining whether a prior felony involved violence or threats, we must look to the statutory definition of the crime, not the particular facts of the case.”) (internal quotation marks omitted)
 - *State v. Schaaf*, 169 Ariz. 323, 334 (1991) (“Because the attempted murder convictions occurred in Nevada, we must look to the Nevada statute’s language to determine whether the statutory definition of attempted murder involves violence or the threat of violence on another person.”)
 - *State v. Fierro*, 166 Ariz. 539, 549 (1990) (concluding language of Texas statutes defining aggravated assault and armed robbery did not require “violence” as defined under applicable Arizona statute)
 - *Joyner*, 215 Ariz. at 138, ¶ 10 (holding prior conviction of armed robbery did not “necessarily establish [defendant] used a deadly weapon or dangerous instrument” based on the statutory elements and thus was not a violent offense)
 - *State v. Larin*, 233 Ariz. 202, 213, ¶¶ 40–41 (App. 2013) (analyzing elements of first-degree burglary and armed robbery to determine if they were “inherently dangerous” or if the offenses could be committed in such a way that did not involve “the discharge, use, or threatening exhibition” of a dangerous instrument)



STATUTES INCORPORATING STRICT CONFORMITY STANDARD

ARS §§ 13-105(18), (27)

DEFINITIONS OF FELONY AND OFFENSE

- Section 13-105(18) defines “felony” as “an offense for which a sentence to a term of imprisonment in the custody of the state department of corrections is authorized by any law of this state.”
- Section 13-105(27) defines “offense” as “conduct for which a sentence to a term of imprisonment or of a fine is provided by any law of the state in which it occurred or by any law, regulation or ordinance of a political subdivision of that state and, if the act occurred in a state other than this state, it would be so punishable under the laws, regulations or ordinances of this state or of a political subdivision of this state if the act had occurred in this state.”
- *State v. Large*, 234 Ariz. 274 (App. 2014), applied these definitions in holding that ARS § 13-708(A) requires that any “foreign offense for which the defendant is on parole must have been punishable as a felony in Arizona.” 234 Ariz. at 281, ¶ 21

ARS § 13-701(D)(11): PRIOR FELONY AGGRAVATING FACTOR

- Aggravating factor when the “defendant was previously convicted of a felony within the ten years immediately preceding the date of the offense. A conviction outside the jurisdiction of this state for an offense that if committed in this state would be punishable as a felony is a felony conviction for the purposes of this paragraph.”

ARS § 13-706(E): SERIOUS, VIOLENT OR AGGRAVATED OFFENDERS

- “For the purposes of this section, if a person has been convicted of an offense committed in another jurisdiction that if committed in this state would be a violation or attempted violation of any of the offenses listed in this section and that has the same elements of an offense listed in this section, the offense committed in another jurisdiction is considered an offense committed in this state.”
- Section 13-706(F)(1) defines “serious offense” to mean “any of the following [listed] offenses if committed in this state or any offense committed outside this state that if committed in this state would constitute one of the” listed offenses

ARS § 13-707(D): MISDEMEANOR SENTENCING

- “A person who has been convicted in any court outside the jurisdiction of this state of an offense that if committed in this state would be punishable as a misdemeanor or petty offense is subject to this section.”

ARS § 13-751: CAPITAL SENTENCING

- Section (F)(1) includes an aggravator for where the “defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.”
- Section (F)(2) includes an aggravator for where the “defendant has been or was previously convicted of a serious offense, whether preparatory or completed.”
 - Section (J) defines “serious offense” as “any of the following offenses if committed in this state or any offense committed outside this state that if committed in this state would constitute one of the following offenses”

ARS § 13-3601.02(A): AGGRAVATED DOMESTIC VIOLENCE

- “A person is guilty of aggravated domestic violence if the person within a period of eighty-four months commits a third or subsequent violation of a domestic violence offense or is convicted of a violation of a domestic violence offense and has previously been convicted of any combination of convictions of a domestic violence offense or acts in another state, a court of the United States or a tribal court that if committed in this state would be a violation of a domestic violence offense.”

ARS § 13-3821(A): SEX OFFENDER REGISTRATION

- “A person who has been convicted of or adjudicated guilty except insane for a violation or attempted violation of any of the following offenses or who has been convicted of or adjudicated guilty except insane or not guilty by reason of insanity for an offense committed in another jurisdiction that if committed in this state would be a violation or attempted violation of any of the following offenses or an offense that was in effect before September 1, 1978 and that, if committed on or after September 1, 1978, has the same elements of an offense listed in this section or who is required to register by the convicting or adjudicating jurisdiction, within ten days after the conviction or adjudication or within ten days after entering and remaining in any county of this state, shall register with the sheriff of that county”

ARS § 28-1383(A)(2): AGGRAVATED DUI

- “A person is guilty of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs if the person ... [w]ithin a period of eighty-four months commits a third or subsequent [DUI] violation ... and has previously been convicted of any combination of convictions of section 28-1381, section 28-1382 or this section or acts in another jurisdiction that if committed in this state would be a violation of section 28-1381, section 28-1382 or this section.”
- *State v. Moran*, 232 Ariz. 528 (App. 2013), applied the *Crawford* strict conformity analysis to conclude that there was not strict conformity between Nevada DUI statute and Arizona DUI statutes. 232 Ariz. at 534-35, ¶¶ 17-20

STATUTES EXCLUDING STRICT CONFORMITY STANDARD

ARS § 13-105(22): DEFINITION OF “HISTORICAL PRIOR FELONY CONVICTION”

- Definition includes “any offense committed outside the jurisdiction of this state that was punishable by that jurisdiction as a felony.” ARS §§ 13-105(22)(d)-(f)
 - Subsection (f), however, does not include “a felony weapons possession violation in any court outside the jurisdiction of this state that would not be punishable as a felony under the laws of this state”
- Similar language used in ARS §§ 13-703(M) (repetitive offender sentencing), 13-704(K) (dangerous offender sentencing)
 - Both of these statutes also include exceptions for a conviction for “a felony weapons possession violation in any court outside the jurisdiction of this state that would not be punishable as a felony under the laws of this state”
 - See also *State v. Dunbar*, 249 Ariz. 37, 50, ¶ 37 (App. 2020) (noting that “the comparative element approach still applies to a felony weapons possession violation” after amendments to ARS § 13-703)

**OFFENSES REQUIRING
PROOF OF A PRIOR
CONVICTION AS AN
ELEMENT**

ARS § 13-1805(I): SHOPLIFTING

- “A person ... who commits shoplifting and who has previously committed or been convicted within the past five years of two or more offenses involving burglary, shoplifting, robbery, organized retail theft or theft is guilty of a class 4 felony.”

ARS § 13-3102(A)(4): MISCONDUCT INVOLVING WEAPONS

- ARS § 13-3101(A)(7)(b) defines a prohibited possessor as any person who “has been convicted within or without this state of a felony or who has been adjudicated delinquent for a felony and whose civil right to possess or carry a firearm has not been restored.”
- *State v. McCurdy*, 216 Ariz. 567 (App. 2007), held that sufficient evidence supported defendant’s conviction for misconduct involving weapons because evidence established a prior California conviction, 216 Ariz. at 573–74, ¶ 16, but also vacated his enhanced sentence based on the prior felony conviction because the record did not establish that his California conviction “would have also been a felony in Arizona.” *Id.* at 574–75, ¶ 19.
 - There is a dissent, but it doesn’t address this apparent inconsistency
 - Best practice would be to make sure that the prior conviction satisfies the strict conformity standard

AGGRAVATED DUI, AGGRAVATED DOMESTIC VIOLENCE

- As discussed above, both Aggravated DUI (ARS § 28-1383(A)(2)) and Aggravated Domestic Violence (ARS § 13-3601.02(A)) require proof of a prior offense within 84 months before the commission of the offense at issue
 - A prior DUI for aggravated DUI
 - A prior domestic violence offense for aggravated domestic violence

CONSIDERATIONS

- Whether strict conformity exists is a legal question. *Heath*, 198 Ariz. at 84, ¶ 4. As such, it is an issue to be determined by the trial court
 - Procedurally, this is an issue that could/should be raised by the defendant, most likely pursuant to a motion dismiss under Rule 16.4(b). See *Moran*, 232 Ariz. at 534, ¶ 15 (stating “a defendant may seek to disqualify a prior conviction before trial, as a matter of law, on the ground the prior criminal act would not have violated Arizona’s DUI laws had it been committed in this state”)
- The existence of the prior felony, however, is a factual matter to be found by the jury.
 - Thus, at trial, you do not need to prove strict conformity to the jury. See *Moran*, 232 Ariz. at 533-34, ¶ 15 (stating that prior DUI convictions “must be proven by the state and found by the trier of fact beyond a reasonable doubt” and that “the state must establish the nature of the prior offense and the responsibility for determining the elements of the offense cannot be delegated, in part to the trial judge”) (internal quotation marks, citation omitted)
 - Cf. *McCurdy*, 216 Ariz. at 573-75, ¶¶ 14-16, 19 (concluding sufficient evidence supported defendant’s misconduct involving weapons conviction notwithstanding later holding that the trial court improperly enhanced defendant’s sentence because the record did not support a finding of strict conformity)

MAKING YOUR RECORD OF STRICT CONFORMITY

- Although the issue of strict conformity is not likely to come up absent a defense motion, you still need to make sure there is strict conformity *before* you file the charge
- Even if defendants don't raise it in trial court, it can still be raised on appeal.
 - Given this, you will still want to make sure the record reflects the statute underlying the out-of-state conviction
- One way to do that would be to specify it in the charging document
- Another way would be by submitting unredacted copies of whatever records you plan to use at trial to establish the prior conviction for appellate purposes only

OTHER STATUTES

ARS § 13-705: DANGEROUS CRIMES AGAINST CHILDREN

- Has various provisions enhancing sentences for defendants who have prior convictions of “predicate felonies”
- ARS § 13-705(Q)(2) defines “predicate felony” as “any felony involving child abuse pursuant to section 13-3623, subsection A, paragraph 1, a sexual offense, conduct involving the intentional or knowing infliction of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument, or a dangerous crime against children in the first or second degree.”

ARS § 13-708: OFFENSES COMMITTED WHILE RELEASED FROM CONFINEMENT

- Allows for enhanced sentences for felony convictions for offenses “committed while the person is on probation for a conviction of a felony offense or parole” or while the person is escaped from custody
- *State v. Large*, 234 Ariz. 274 (App. 2014), held that “before enhancing a defendant’s sentence based on his parole status from a foreign conviction, a court must determine that the foreign offense for which a defendant is on parole has an analog under Arizona law.” 234 Ariz. at 28-81, ¶ 20.
 - See also *State v. Weible*, 142 Ariz. 113, 118 (1984) (holding prior version of ARS § 13-708 applied “to defendants that are on parole from felony convictions regardless of where the defendants’ parole status originated,” and that “[t]he test is whether the prior felony conviction ... would have been authorized by the laws of Arizona.”)

ARS § 13-901.01: PROP 200

- Generally requires mandatory probation for first time convictions for personal possession of drugs
- Subsection (B) contains an exception for “[a]ny person who has been convicted of or indicted for a violent crime as defined in section 13-901.03”
- ARS § 13-901.03(B) defines violent crime as “any criminal act that results in death or physical injury or any criminal use of a deadly weapon or dangerous instrument.”
- *State v. Joyner*, 215 Ariz. 134 (App. 2007), applied the strict conformity test in holding that armed robbery conviction was not a “violent crime” because the elements did not “necessarily establish [the defendant] used a deadly weapon or dangerous instrument.” 215 Ariz. at 138, ¶ 10

ARS §§ 13-3407, -3408: POSSESSION OF DANGEROUS/NARCOTIC DRUGS

- Both statutes contain provisions allowing for lesser sentences/misdemeanor designation for personal possession if the defendant has no prior felony convictions
- ARS § 13-3407(E) allows for enhanced sentences if the defendant was previously convicted of a meth sales offense as defined in ARS §§ 13-3407 or 13-3407.01
 - Would not apply to out-of-state convictions
 - For meth sales, can elect to sentence a defendant as a repetitive offender while still requiring the sentence to be served in calendar years. See *State v. Scalp*, 245 Ariz. 177 (App. 2018). So even if you can't use an out-of-state conviction for selling methamphetamine to enhance a sentence under ARS § 13-3407(E), you could still use it as a historical prior felony conviction.

CONCLUSION

SUMMARY

- Generally, if you want to enhance a defendant's sentence using an out-of-state conviction, you need to show that there is "strict conformity" between the statute underlying the out-of-state conviction and an Arizona offense
- This is done by comparing the elements of the out-of-state offense and the Arizona offense
 - It does not take into account the facts underlying the out-of-state conviction
 - The out-of-state offense must include "every element that would be required to prove an enumerated Arizona offense."
 - Arizona offenses can cover a broader range of activity without failing strict conformity; however, if the out-of-state statute covers a broader range of conduct, you'll likely not have strict conformity unless you can establish the defendant was convicted or sentenced under a specific subsection that would meet the strict conformity standard
- Courts can look to charging and sentencing documents to narrow down which provision of the out-of-state statute the defendant was convicted under

PRACTICE POINTERS

- If you're going to use an out-of-state conviction to enhance a defendant's sentence, best practice would be to file a sentencing memorandum detailing why the out-of-state conviction can be used
 - If the enhancement is based on historical prior felony convictions, rely on the definitions in ARS § 13-105(22) and ARS § 13-703(M) which generally provide that out-of-state felony convictions can be used if they were a felony in the state of conviction
 - Otherwise, you'll need to go through the comparative elements test and show that there is no hypothetical scenario where a defendant could commit the out-of-state offense without also committing an Arizona offense
- Even if the defendant admits the prior felonies, the burden is still on the State to prove the out-of-state conviction would qualify as an Arizona conviction

QUESTIONS

■ Joshua.Smith@azag.gov